Seafood Wholesalers, Ltd. *and* International Union of Operating Engineers, Local Union 564, AFL–CIO. Cases 16–CA–25998, 16–CA–26017, 16–CA–26275, and 16–RC–10819

July 24, 2009

DECISION, ORDER, CERTIFICATION OF REPRESENTATIVE, AND OF SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On February 3, 2009, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order,[4] as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Seafood Wholesalers, Ltd., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for the paragraph beginning with "IT IS FURTHER ORDERED."

"IT IS FURTHER ORDERED that in Case 16–RC–10819, the Employer's objections to the election in the warehouse unit are overruled, the Union's Objection 5 to the election in the drivers unit is sustained, the election in the drivers unit is set aside, and a new election in the drivers unit shall be conducted.

IT IS FURTHER ORDERED that Case 16–RC-10819 is severed from Cases 16–CA–25998, 16–CA–26017, and 16–CA–26275."

2. Substitute the attached notice to employees for that of the administrative law judge.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Union of Operating Engineers, Local Union 564, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> INCLUDED: All full time and regular part time warehouse employees including expeditor trainees, freezers, freezer/order pullers, fresh cutter/lobsters, freezer restockers, fresh cutters, and fresh inventory employees

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[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, (2d Cir. 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) by failing to bargain over employee Kenneth Graham's layoff, Chairman Liebman does not rely on the fact that layoffs at the facility were unprecedented. *Bob Townsend / Colerain Ford*, 351 NLRB 1079, 1083 (2007); *Falcon Wheel Division, L.L.C.*, 338 NLRB 576, 576–577 (2002); *Adair Standish Corp*., 292 NLRB 890, 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990).

Because the Respondent does not contend in its exceptions that its layoff of Graham was consistent with an established past practice, and as the record shows that no such practice existed, Member Schaumber finds it unnecessary to reach the legal issue of whether a well-established, consistent, past practice regarding layoffs prior to the advent of the Union would have excused the Respondent's obligation to bargain with the Union regarding the layoff here. See *Champion Home Builders*, 350 NLRB 788, 791 fn. 16 (2007).

[3] In the absence of exceptions, we adopt, pro forma, the judge's recommendation to overrule the Union's Objections 1, 3, and 6 to the election in the drivers unit. In addition, because we adopt the judge's recommendation to sustain the Union's Objection 5, alleging that the Respondent improperly used an agent of management, David Molina, as its election observer, we find it unnecessary to pass on the judge's recommendation to sustain the Union's Objection 4, alleging that the Respondent engaged in objectionable conduct by providing the Union with an *Excelsior* list that contained incorrect employee addresses. Because we do not pass on Objection 4, we also do not pass on the judge's recommendation that the Respondent "ascertain the current addresses of all employees in the drivers unit and report those addresses upon the Excelsior list."

[4] We shall modify the judge's recommended Order to reflect our finding that it is unnecessary to pass on the Union's Objection 4 to the election in the drivers unit. We shall also delete the requirement in the judge's recommended Order that the Regional Director issue a certification of representative in the warehouse unit and, instead, shall issue the certification herein. See *Hanson Material Service Corp*, 353 NLRB No. 10, slip op. at 2 fn. 7 (2008); *Talmadge Park, Inc.,* 351 NLRB 1241, 1241 at fn. 4 (2007).

employed by the Employer at its Houston, Texas, warehouse located at 6060B Southwest Freeway, Houston, Texas;

EXCLUDED: All other employees, managerial employees, guards, and supervisors as defined in the National Labor Relations Act.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the drivers unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc*., 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Union of Operating Engineers, Local Union 564, AFL-CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. July 24, 2009

Wilman B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from engaging in workplace conversations relating to the Union while permitting workplace conversations about other subjects or suspend you for protesting any such prohibition.

WE WILL NOT lay off or otherwise discriminate against any of you because of your membership in or activities on behalf of International Union of Operating Engineers, Local Union 564, AFL–CIO, or any other labor organization.

WE WILL NOT unilaterally, without notice to and bargaining with the Union, lay off any warehouse bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Kenneth Graham full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Kenneth Graham whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension and discriminatory layoff, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discriminatory layoff, and within 3 days thereafter, notify Kenneth Graham in writing that this has been done and that the suspension and layoff will not be used against him in any way.

SEAFOOD WHOLESALERS, LTD

Jamal M. Allen, Esq., for the General Counsel.
David D. Schien, Esq., for the Respondent.
Mr. Bobby Brown, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. These cases were tried in Houston, Texas, on December 15 and 16, 2008, pursuant to a consolidated complaint that issued on September 30, 2008.[1] The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by discriminatorily prohibiting workplace discussions about the Union and suspended Kenneth Graham because he protested the foregoing prohibition, violated Section 8(a)(1) and (3) of the Act by laying off Graham because of his union activities, and violated Section 8(a)(1) and (5) of the Act by laying off Graham without notice to or bargaining with the Union. The Respondent's answer denies any violation of the Act. I find that the Respondent violated the Act as alleged in the complaint.

On September 30, 2008, the Regional Director for Region 16 also issued an Order Directing Hearing, Order Consolidating Cases and Consolidated Complaint in which certain objections to the elections held in Case 16–RC–10819 were consolidated for hearing with the foregoing consolidated complaint. As hereinafter discussed in greater detail, the objections relate to elections held on January 15 in a unit of the Employer's drivers and a unit of the Employer's warehousemen. The drivers rejected representation by the Union, the Union filed objections to that election, and the Regional Director referred the Union's Objections 1 and 3 through 6 to hearing. The warehousemen selected the Union as their collective bargaining representative, the Employer filed objections to that election, and the Regional Director referred the Employer's Objections 1 through 3 to hearing.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent and a letter of its statement of position by the Union, I make the following

[1] All dates are in 2008 unless otherwise indicated. The charge in Case 16–CA–25998 was filed on January 9, the charge in Case 16–CA–26017 was filed on January 25, and the charge in Case 16–CA–26275 was filed on June 20.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Seafood Wholesalers, Ltd. (the Company), is a Texas limited liability corporation engaged in the distribution of seafood to hotels, restaurants, and retail customers from its facility in Houston, Texas. The Company annually sells and ships from its Houston, Texas facility seafood valued in excess of $50,000 directly to points located outside the State of Texas. The Company admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Union of Operating Engineers, Local Union 564, AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The Company's day-to-day operations are overseen by President Sahfiq (Shane) Islam, who is also a part owner, and General Manager Erik Brown. The operations are conducted from a two story facility. The first floor is the operational floor upon which the loading dock, freezer, cooler for fresh seafood, dispatch room, and ready room in which pallets are loaded are located. Administrative offices are located on the second floor.

The issues herein occurred in the context of the Union's organizational campaign. Employee Kenneth Graham contacted the Union and was its chief proponent among the employees of the Company. On November 29, 2007, the Union filed a representation petition seeking a unit of "all drivers, expeditors and production and maintenance employees." At a representation case hearing held on December 13, 2007, the Union and Employer stipulated to the appropriateness of two separate units, a drivers unit and a warehouse unit. On December 20, 2007, the Regional Director issued a Decision and Direction of Election finding that the two separate units to which the parties had stipulated were appropriate units.

The appropriate drivers unit is:

> INCLUDED: All full time and regular part time drivers employed by the Employer at its Houston, Texas, warehouse located at 6060B Southwest Freeway, Houston, Texas;
>
> EXCLUDED: All other employees, managerial employees, guards, and supervisors as defined in the National Labor Relations Act.

The appropriate warehouse unit is:

> INCLUDED: All full time and regular part time warehouse employees including expeditor trainees, freezers, freezer/order pullers, fresh cutter/lobsters, freezer restockers, fresh cutters, and fresh inventory employees employed by the Employer at its Houston, Texas, warehouse located at 6060B Southwest Freeway, Houston, Texas;
>
> EXCLUDED: All other employees, managerial employees, guards, and supervisors as defined in the National Labor Relations Act.

The elections in the foregoing units were held on January 15.

In the drivers unit, which consisted of 13 employees, 4 votes were cast for the Union and 5 votes were cast against representation. There was one void ballot. The Union/Petitioner filed objections claiming, inter alia, that the provision of an inaccurate Excelsior list and use of a supervisor as the Company observer at the election invalidated the election in the drivers unit. In the warehouse unit of 15 employees, 8 votes were cast for the Union and 7 votes were cast against representation. The Company/Employer filed objections claiming, inter alia, that Graham engaged in conduct "designed to flaunt his relationship with the union" and that the Union made false statements regarding overtime and pay policies.

On January 9, 6 days before the election, Graham was sent home by General Manager Erik Brown after he and another employee engaged in a conversation overheard by a manager. As hereinafter discussed, there is a dispute regarding what was said in that conversation as well as what Graham was told when he was sent home.

On January 25, 10 days after the election, Graham was laid off. The Company contends that the layoff was an economic layoff. The General Counsel and Union contend that the layoff was in retaliation for Graham's union activity.

B. Facts

Employee Kenneth Graham was hired as a maintenance employee on September 4, 2007. Although there is no contention that Graham misrepresented his skills, the Company found his skills insufficient for certain maintenance jobs. In early November, Graham was reassigned to be trained and work as an expeditor. He received a 50-cent-an-hour pay increase and was performing work as an expeditor at all relevant times herein. Expeditors assure that pallets of seafood prepared for delivery match the load sheets, sometimes incorrectly called invoices. The load sheets are prepared in an office on the second floor of the facility and electronically sent to a printer in the dispatch room on the first floor of the facility where they are printed out and separated by the expeditors according to the route of the truck. The expeditors then confirm that the pallets being placed on a specific truck match the load sheets for that route. Expeditors also assist in loading the delivery trucks in order to assure their timely departure. There is no claim or evidence of any deficiency in Graham's work as an expeditor.

On November 16, 2007, and again on November 29, 2007, the Union wrote the Company identifying Graham as chairman of its voluntary in-plant organizing committee. Although the Company denied receiving the November 16 letter, the November 29 letter was sent by certified mail and signed for on behalf of the Company.

On December 13, 2007, Graham appeared, pursuant to subpoena, with Union Organizer Eric Wells at the representation hearing. Although the Union had petitioned for a single unit, as already noted, the parties stipulated to two units. Although the Company, in its objections, cites the failure of Graham to report to work before and after the hearing, Graham had informed his supervisor, Steve Gil, that he would be absent that day. After General Manager Erik Brown investigated, no discipline was taken against Graham.

Following the representation case hearing, President Shane Islam made it a point to speak individually with every employee. Islam acknowledged that, upon learning of the organizing campaign, he was "shocked" that "any of our employees would be unhappy … at work," and, therefore he "personally wanted to meet with each and every individual and find out exactly how we can move forward with it." Those meetings were conducted at various locations when the employee was available. Because a significant number of the Company employees speak Spanish, Islam typically utilized Retail Sales Manager David Molina, who was "fluent in both languages, and … [had] a lot of respect downstairs with most of the employees," as an interpreter. Islam stated that Molina "was part of the process that I was working with." After Islam met with "pretty much all the other employees," he had a short conversation with Graham in which he assured him that "if you work hard, you will get a raise regardless" of the outcome of the election. Graham replied, "No, [the] Union will get me a raise." Although Graham denied that conversation, I find that, almost a year after it occurred, he simply did not remember it. There are no allegations that any statements made by Islam, who "spent a lot of time making sure that I did say what I could and did not say what I could not," violated the Act.

On January 9, six days prior to the election, Graham engaged in a conversation with employee Lorenzo Yax. Graham recalls that he and Yax were separating invoices, i.e. loading sheets, in the dispatch room. They started talking about the Union. In their conversation, which according to Graham lasted three or four minutes and according to Yax lasted two or three minutes, Yax stated that he was going to "take the drivers upstairs and tell them to vote no." The voting place was to be upstairs where the administrative offices are located. Graham replied that Yax was not going to do that, that he, Graham, would tape him and let the Labor Board listen to what he said. Business Development Manager Wayne Herff came to the hallway door of the dispatch room, told them to stop, and stated to Graham that he "couldn't be talking about the Union on Company time." In response to that admonition, Graham left and went to the ready room where the expeditors place the product on pallets and began working there.

Yax, who understands some English but whose first language is Spanish and who testified through an interpreter, contends that the conversation began when Graham came to the ready room door of the dispatch room and asked who was going to win the election. Yax replied that he did not know. Graham asked why he said that, and Yax repeated that he did not know who was going to win. Yax claims that Graham continued, asking for the names "of people who were going to vote for or against," and Yax replied that he did not know. Graham answered, saying that Yax "knew something." Yax then asked Graham to leave him alone and let him work. Manager Herff came to the hallway door of the dispatch room and told the employees to "get to work and not be fighting." Yax confirmed that Graham left and "I continued working." A pretrial affidavit signed by Yax makes no claim that Graham was out of his work area or that he insisted that Yax provide him with employee names. Yax and Graham were not "fighting," and Herff does not claim to have used the word "fighting."

Manager Herff claims that he was actually in the dispatch room obtaining some paperwork from the printer and overheard Graham ask Yax, who was standing about two feet away from Graham, why he was "not helping him," why he was "against what was going on." Yax replied that he had work to do and said, "I can't answer you." Herff admits that the conversation related to the election. As he left the dispatch room, Herff says he told the employees that it was "time to get back to work." Despite that admonition, Herff testified that he heard Graham continuing the discussion, that he returned to the door of the dispatch room and repeated, "You need to get back to work."

Shortly after this, Graham spoke with Herff. He approached Herff and said that he could talk about the Union and that Herff replied, "No, you cannot." Herff recalled that Graham asked why he had stopped him and that he answered that there was work that needed to be done. Graham responded that he could talk to anyone at Herff says that he decided to report the foregoing incident to General Manager Erik Brown. Brown, on the same day, January 9, prepared a memorandum relating to the incident. The memorandum recites that Herff reported to Brown that he "cautioned Mr. Graham that his activity was not allowed during work time and in the work area." Herff denied using those words when making his report.

Before speaking with Graham, General Manager Brown spoke with Yax. In his memorandum, Brown reports that Yax informed him that Graham told him that he would be hurting everyone by voting against the Union and suggested that Yax not vote. Consistent with the omissions from Yax's pretrial affidavit, the memorandum does not state that Yax claimed that Graham questioned him about other employees or that Graham was out of his work area. Although the memorandum states that Yax "did not think that type of behavior and interruption of his duties was right," Brown could not have concluded that the foregoing remarks caused Yax more than an insignificant interruption. As pointed out in the brief of the General Counsel, a brief comment related to a union "does not occupy enough time to be treated as a work interruption in most work settings." *Wal-Mart Stores*, 340 NLRB 637, 639 (2003).

The version of the conversation to which Yax testified differs from the report that Brown recorded. Brown did not question Graham regarding the content of his conversation with Yax. Brown's memorandum reflects no report of harassment, simply an expression of opinion that Yax would be hurting everyone if he voted against the Union. Herff's recollection of what he overheard differs from both of Yax's versions. Graham credibly testified to what Yax said directly to him and how he responded. I credit the testimony of Graham.

All witnesses agree that the conversation between Graham and Yax related to the election. Although Herff claims that the memorandum incorrectly reports what he said to Graham, it is undisputed that Graham approached him after he had, according to his testimony, told both employees to "get back to work." I credit Graham's testimony that Herff told the employees to stop and then told Graham he "couldn't be talking about the Union on Company time." It was that statement that caused Graham to return and assert his right to talk about the Union. General Manager Brown admitted that the Company has no prohibition against employees discussing nonwork related subjects "[a]s long as it doesn't interfere with work."

After receiving the report of Herff and speaking with Yax, General Manager Brown called Graham to his office, at which he had Retail Sales Manager David Molina present as a witness. Graham recalls that General Manager Brown told him that he "couldn't be talking about the Union at the job." Graham disputed this, stating that as long as he was doing his job he "could talk about the Union." Graham recalled that they exchanged the same words three or four times and that Brown finally stated, "I'll tell you what you do; you go home and get with your Union, investigate the law." Graham asked if he was fired, and Brown answered, "No; come back tomorrow." He did so, bringing copies of "some cases" that held that if "you wasn't slowing down production you could talk about the Union as much as you could talk about football or anything else." Brown admitted receiving the documents that Graham brought.

General Manager Brown claimed that he asked Graham to explain when he could talk about the Union and that Graham replied that he could talk about the Union so as long as he was not trying to solicit signatures. Brown told Graham that he was mistaken, that he could talk about the Union "during his lunch break and when he was off the clock." The memorandum reports that Graham stated that he could talk about the Union with employees "while they were working" as long as he was not "trying to get signatures." Brown's memorandum confirms that he told Graham that "that activity was confined to before and after work, during break times in the break room or lunch room, or other non-working [sic] times in non-company work areas." The memorandum states that Brown then stated that the Company "would not tolerate interrupting work flow with union activity." The memorandum reports that Graham accused the Company of lying to employees about the Union, referring to information he had received from employees following conversations in which managers had spoken with them. Brown replied that they were there to talk about Graham's behavior, not the issues he was raising, and that he repeated that "we would not tolerate that activity on company time in company work areas, which interfered with work." Brown sent Graham home and told him to "consult the Union on the specifics of allowable organizational activity."

General Manager Brown admitted that Graham did not threaten him but that the conversation became "argumentative" and that he sent Graham home because "I had things I needed to do." Brown denied that Graham was disciplined "for talking about the Union," that that was "not my intent." Despite the foregoing denial of his "intent," Brown did not direct Graham to return to work; he sent him home.

I credit Graham regarding the foregoing meeting. I do not credit Brown's claim that the statement he admits making, that Graham could not talk about the Union except before and after work and at "non-working [sic] times in non-company work areas," was modified by any exception for talk that did not interfere with work as stated in his memorandum. Retail Sales Manager Molina, whom Brown had present as a witness, was not asked about this meeting.

President Islam explained that he had learned over the "ten years that I've been in management" to always have a witness "outside of an official management capacity" present in con-

versations with employees, that "HR [Human Relations] rule 101 … [is] always have somebody with you as a witness." He did not explain why he considered Retail Sales Manager Molina to be outside "an official management capacity." Molina, in addition to serving as interpreter for Islam in the individual meetings he had relating to the Union, acknowledged that he regularly served as an interpreter in meetings relating to employee discipline, including the meeting between General Manager Brown and Graham.

Ten days after the election, Graham was laid off. General Manager Brown informed him that business was slow and that he was laid off until Lent, when business normally picked back up. Although stating that "a few others would be laid off," Brown did not identify them. At the time Graham was laid off, a newly hired salesperson, Conway Karr, was performing duties as an expeditor. General Manager Brown did not dispute that Karr was working as an expeditor when Graham was laid off, explaining that salespersons are trained in all aspects of the Company's operations. When Graham returned to pick up his last paycheck he observed that employee Jesse Lopez, "who worked in the freezer [and] had been there like maybe two weeks" was still working. Graham noted that, on occasion, he had worked in the freezer.

It is undisputed that the Company experiences an annual cyclical downturn in business in January. Historically, the Company had reduced its employee complement by reducing hours which resulted in employees quitting. The parties stipulated that no employees were laid off for economic reasons in either 2006 or 2007. Brown confirmed that "we'd not necessarily laid anybody off, but we'd cut hours enough where people had to go find something else to do, but this time we just did it a little differently." He testified that, on January 22, he met with President Islam and other managers and that former Transportation Manager Steve Gil came up with "with the idea" that, instead of trimming hours, the Company "get rid of" people it did not need.

President Islam testified to meeting with Transportation Manager Gil, General Manager Brown, and the accounting manager, sometime during the first two weeks of January where they discussed that they had "too many hours during December; we need to cut down the hours; we need to cut down the number of people." Islam did not state that layoffs were discussed and did not mention such a suggestion by Gil. Gil, who is no longer employed, did not testify, thus Brown's testimony that Gil suggested layoffs is uncorroborated. President Islam confirmed that, in the past, the Respondent had cut down on the number of people by reducing hours, resulting in employees quitting. Although testifying that he was the President, and "I make all the decisions," he avoided specifically admitting that he made the layoff decision stating that "laying off was one of the least of my concerns."

There is testimony of only one January management meeting relating to "too many hours." I find that Islam was mistaken with regard to the date and that the meeting occurred after the January 15 elections. On January 22, the January figures would not have been complete. Islam testified that the impetus for the meeting was "too many hours in December."

The Company presented documents reflecting that the anticipated business downturn did occur in January but that the expected upturn in March and April did not occur.

General Manager Brown claimed that he selected four employees for layoff including Graham, but there is no evidence that any employee other than Graham was laid off. Although claiming that Luis Garcia, a cutter, was selected for layoff, Garcia was not laid off on January 25. He was retained supposedly because another cutter, Saul Garcia, was discharged. Saul Garcia walked off the job on January 26, the day after Graham was laid off, did not return, and was discharged on January 29. Although claiming that administrative employee Megan Estupinan was selected for layoff, she gave two weeks notice of her resignation on January 22, the day Islam, Brown, and other managers met, which was prior to any employee being laid off.

Brown claims that employee Jesse Lopez, who had been hired on December 14, 2007, and worked in the freezer and whom Graham had observed working when he picked up his last paycheck, was laid off and recalled because an employee with five or six years experience, whom he did not name, was absent because of a respiratory infection. Brown gave no dates for the alleged layoff and recall of Lopez. His recollection was that, when recalled, Lopez worked two or three weeks. Contrary to Brown's testimony, the payroll record reflecting that Graham received his "last check" after working 4 days in the pay period January 21 through February 2 reflects no last check for Lopez, who worked 10 days during that pay period. It also does not, during that pay period or the two subsequent pay periods, reflect that any employee listed was absent due to illness. All employees on the payroll for January 21 through February 2 except Brown, Saul Garcia, who was discharged on January 29, and Miguel Castro, a new employee who worked only 5 days, continue to appear on the next two payrolls, and all of them worked for 10 or more days in the next two pay periods except for Lopez who worked only eight days in the pay period between February 2 and 16. Lopez and all other employees who were working at the end of the pay period in which Graham was laid off worked 10 or more days in the pay period February 18 through March 1. Lopez worked 5 days in the pay period beginning March 3. Thus, contrary to the recollection of Brown that Lopez was recalled and worked two or three weeks, he continued to work for six weeks after Graham was laid off. The foregoing documentary evidence does not reflect that Lopez was laid off or that a long term employee was absent due to a respiratory infection, the purported reason for the recall of Lopez. Thus, the payrolls contradict Brown's testimony insofar as they establish that only Graham was laid off.

C. Analysis and Concluding Findings

The complaint, in paragraphs 10 and 16, alleges that the Respondent discriminatorily prohibited workplace discussions about the Union and suspended Kenneth Graham because he protested the foregoing prohibition in violation of Section 8(a)(1) of the Act. Paragraphs 11, 12, and 17 of the complaint allege that the Respondent violated Section 8(a)(1) and (3) of the Act by laying off Graham because of his union activities. Paragraphs 11, 13, 14, 15 and 18 allege that the Respondent violated Section 8(a)(1) and (5) of the Act by laying off Graham without notice to or bargaining with the Union.

With regard to the Section 8(a)(1) allegation, General Manager Brown admitted that the Respondent does not prohibit the discussion of nonwork related subjects "[a]s long as it doesn't interfere with work." Notwithstanding that admission, his memorandum reports that he asked Graham to explain when he could talk about the Union, a question that would not have been asked if the overheard conversation had related to a nonwork subject, such as the most recent Houston Oilers football game, i.e. "When can you talk about football?" I have credited Graham that Brown told him that he "couldn't be talking about the Union at the job." Graham disputed this, stating that as long as he was doing his job he "could talk about the Union."

Brown's memorandum effectively confirms the testimony of Graham insofar as it limits any union related conversation, "that activity," to times "before and after work, during break times in the break room or lunch room, or other non-working [sic] times in non-company work areas." The foregoing limitation to nonworking times in noncompany work areas too broadly prohibits both solicitation and nonwork related conversation. It fails recognize that "[a]n employer may not restrict union related conversations while permitting conversations relating to other topics." *Rockline Industries*, 341 NLRB 287, 293 (2004); *Jensen Enterprises,*, 339 NLRB 877, 878 (2003).The Respondent, by prohibiting employees from engaging in workplace conversations relating to the Union while permitting workplace conversations about other subjects, violated Section 8(a)(1) of the Act.

The Respondent, in its brief, asserts that Graham was "suspended for the rest of his shift due to his refusal to return to his assigned work station and stop harassing another employee." Graham neither harassed another employee nor refused to stop any alleged harassment. General Manager Brown did not question Graham regarding the conversation in which he and Yax had engaged. Brown did not direct Graham to return to his work station, and at no time did Graham refuse to do so. According to Graham, Brown told him to "go home and get with your Union, investigate the law." Brown's own memorandum reports no refusal by Graham to return to work and effectively corroborates Graham, stating that he did send him home with instructions to "consult the Union on the specifics of allowable organizational activity." Graham was sent home for disputing the Respondent's limitation of his Section 7 rights. The Respondent, by suspending Graham for protesting the overly broad restriction upon his lawful Section 7 activity, violated Section 8(a)(1) of the Act.

The complaint alleges that the layoff of Graham violated Section 8(a)(3) of the Act. In addressing this allegation I apply the analysis prescribed in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). cert. denied 455 U.S. 989 (1982). The Respondent was aware of Graham's union activity. The prohibition imposed upon Graham with regard to union related workplace conversations establishes animus towards both Section 7 and union activity. Graham's layoff was an adverse employment action. The past practice of the Respondent was to reduce hours in response to the January cyclical downturn. The unprecedented layoff of Graham establishes a motivational link between his union activity and the Respondent's action. Thus it was incumbent upon the Respondent to "demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. at 1089.

Resorting to the layoff of leading union proponents, thereby deviating from a past practice of reducing hours in order to cope with a downturn in business, has been found in various cases to be evidence of a discriminatory motive. See *Gurabo Lace Mills, Inc.*, 265 NLRB 355, 363 (1982); *Thomas Cartage, Inc.*, 186 NLRB 157, 164 (1970). The timing of the layoff of Graham, nine days after the election and six days before the end of the month of January, is further evidence of a discriminatory motivation. Although relying upon the January 2008 figures to establish the extent of the cyclical downturn, Islam's testimony establishes that the impetus for the January meeting was "too many hours during December." January figures could not have been complete until after January 31. There is no evidence that partial January figures were available, and Graham was laid off on January 25, prior to the end of the month.

Although General Manager Brown took responsibility for selecting Graham and purportedly three other employees for layoff, he did not take responsibility for making the layoff decision, stating that the idea of layoffs was suggested by former Transportation Manager Gil, who did not testify. President Islam did not corroborate the testimony of Brown that Gil mentioned layoffs. According to Islam, "laying off was one of the least of my concerns."

Whether General Manager Brown acted on his own or pursuant to instructions from President Islam is immaterial. It is clear that the Respondent was not contemplating layoffs prior to the election. Any contrary contention is refuted by Islam's preelection conversation with Graham after he had spoken with "pretty much all the other employees." Islam assured Graham that "if you work hard, you will get a raise regardless" of the outcome of the election. The foregoing assurance belies any consideration of layoffs prior to the election, an election that the Respondent, as a result of Islam's personal contact with each employee, had sought to win.

The foregoing evidence compels the conclusion that, when the Respondent lost the election in the warehouse unit, it determined to lay off the leading proponent of the Union, Graham. The Respondent, in its brief, although asserting the January downturn in business as economic justification for laying off Graham, does not address the undisputed evidence that layoffs were unprecedented and that the past practice of the Respondent was to reduce hours. Nor does it address, as pointed out in the brief of the General Counsel, that Graham's work as an expeditor continued to be performed by a salesperson in training, Conway Karr.

In testimony, General Manager Brown sought to make the Respondent's deviation from its past practice of reducing hours appear equitable by claiming that he selected four employees for layoff. I do not credit that claim. Although claiming that he selected Luis Garcia, a cutter, for layoff, Garcia was not laid off on January 25. He was retained supposedly because another cutter, Saul Garcia, was discharged; however Saul Garcia engaged in no misconduct until January 26 and was not discharged until January 29. Although claiming that administrative employee Megan Estupinan was selected for layoff, she gave notice of her resignation on January 22. Brown's claim that

employee Jesse Lopez was laid off and recalled due to the illness of another employee whom Brown did not identify is not supported by the documentary evidence. As discussed above, Brown gave no dates for the purported layoff or recall and Lopez worked for six weeks after January 25. The pay record of Lopez for the period January 21 through February 2 does not reflect that he received a last check and does reflect that he worked 10 days. All employees working at the end of the pay period in which Brown was laid off continue to appear on the next two payrolls. Graham was the only employee who was laid off.

I do not credit Brown's attempt to make the layoff of Graham appear equitable by purportedly choosing three other employees for layoff, none of whom were laid off. President Islam had assured Graham that, if he worked hard, he would get a raise regardless of the outcome of the election. The Respondent precipitously deviated from its past practice of reducing employees' hours rather than laying off employees following its loss of the election in the warehouse unit, and the only employee it laid off was Graham, the leading proponent of the Union. The Respondent has not demonstrated that Graham would have been laid off in the absence of his union activity. By laying off Kenneth Graham because of his union activity, the Respondent violated Section 8(a)(3) of the Act.

With regard to the 8(a)(5) allegation, the threshold issue is whether there was a bargaining obligation. As hereinafter discussed, I find that the Employer's objections to the election in the warehouse unit have no merit and that the Union should be certified as the exclusive collective bargaining representative of the employees in that unit. It is well settled that a respondent acts at its peril when acting unilaterally pending the resolution of objections to an election. *Overnite Transportation Co.*, 335 NLRB 372, 373 (2001), citing *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974). The Respondent, citing *Sundstrand Heat Transfer, Inc., v. NLRB.*, 538 F.2d 1257 (7th Cir. 1976), argues that the foregoing precedent is inapplicable. *Sundstrand* is inapposite. In *Sundstrand*, the Court of Appeals refused to apply the "at-its-peril" doctrine to a failure to engage in effects bargaining with regard to an economic layoff that was not alleged as a unilateral change and which was caused by compelling economic circumstances. I note parenthetically that Houston is in the Fifth Circuit which has consistently applied the "at-its-peril" doctrine. See *Anchortank, Inc. v. NLRB.*, 218 F.2d 1153 (5th Cir. 1980). The Respondent's obligation to bargain began on the date of the election, January 15.

The Respondent's past practice in response to the cyclical January business downturn had been to reduce employees' hours. There is no evidence that the economic circumstances herein were substantively different from previous years. There is no evidence that, when Graham was laid off before the end of January, any manager had seen or reviewed any partial January business figures. Layoffs were unprecedented, thus laying off constituted a change in employees' terms and conditions of employment. Layoffs constitute a "material, substantial, and significant change" in employees' terms and conditions of employment and are, therefore, mandatory subjects of bargaining. *Falcon Wheel Division, L.L.C.*, 338 NLRB 576 (2002). The remedy for the unilateral layoff of an employee is that the employee be offered reemployment to that employee's former position and be made whole for loss of earnings and other benefits. Id at 577. It is undisputed that there was no notice to or bargaining with the Union regarding the layoff of employee Graham. I find that the Respondent violated Section 8(a)(5) of the Act by laying off Kenneth Graham without notice to or bargaining with the Union.

III. THE OBJECTIONS

A. The Employer's Objections

The Employer's objections to conduct affecting the election relate to the warehouse unit in which the employees selected the Union as their collective bargaining representative. The Employer contends that Graham engaged in conduct "designed to flaunt his relationship" with the Union and, in its brief, asserts that Graham's "improper and aggressive actions . . . tainted the results of the election of the warehouse unit."

Objection 1 alleges, in subparagraph a, that Graham absented himself for work without leave on December 13, 2007, when he appeared at the representation hearing. In its brief, the Employer contends that Graham, who was reimbursed for the wages he lost on the day of the representation hearing, was an "agent of the Union." As pointed out in the statement of position filed by the Union, there is no evidence that Graham was an agent of the Union rather than an employee exercising his Section 7 rights. A union's reimbursement to employees for attendance at hearings and serving as observers is proper unless it is so disproportionate to the employees' wages that it constitutes a monetary inducement for support of a union. See *Commercial Letter, Inc.*, 200 NLRB 534 (1972); *Quick Shop Markets*, 200 NLRB 830 (1972). The reimbursement for lost wages to Graham, who initially contacted the Union and was chairman of its voluntary in-plant organizing committee, did not constitute a monetary inducement. Graham credibly testified that he showed his subpoena to supervisor Steve Gil and informed him that he would be "taking the day off." General Manager Erik Brown testified that, although he had been unaware that Graham would be absent, he learned that a subpoena had been shown to Gil and that he issued no discipline to Graham.

Subparagraph b of Objection 1 alleges that Graham engaged in "frequent violations of the company policy against solicitation." There is no evidence that Graham engaged in any improper solicitation. Subparagraph b further alleges that Graham "harassed a co-worker," referring to the conversation between Graham and Yax on January 9. As discussed above, there was no harassment. There was a short conversation in which Yax told Graham that he was going to tell the drivers to vote no, and Graham said that he would go to the Labor Board.

Subparagraph c of Objection 1 asserts that Graham's actions "damaged the ability of the company to respond to orders from its customers. " The Employer presented no evidence establishing any damaged ability to respond to customer orders.

Objection 2 alleges that false statements regarding overtime were made by Graham and other representatives of the Union. The only evidence relating to this objection was the credible testimony of Organizer Wells that he did tell the drivers that he would investigate their complaints relating to alleged improper

payment of overtime, that he did so, and that he informed the drivers that they were being paid properly. No evidence contradicting that testimony, which related only to drivers, was presented.

Objection 3 alleges that Graham did not request time off in order to serve as the Union's election observer and that, in view of the incident with Yax, his serving as an observer "was prejudicial to the Company." This objection further states that Counsel for the Employer "spoke directly to the election representation of the NLRB prior to the election" with regard to Graham serving as an observer, but it states no specifics of that conversation. The Employer's brief asserts that Graham did not request to be off and that it "made a timely complaint to the NLRB representative," the substance of which is not stated, and that Graham, as an observer, "was on the Union payroll." The only evidence relating to any complaint was Graham's testimony that he informed Eric Wells that Molina was a manager, that it was illegal for him to be at the table, and that, after he said that, an unnamed representative of the Employer retorted that, because Graham was the lead union organizer, he could not be at the table. Neither Counsel nor any other representative of the Employer testified to the substance of its "timely complaint." Graham credibly testified that he informed his supervisor Steve Gil that he would be serving as an observer and that Gil said that was "fine." Although General Manager Brown testified that discipline was discussed, no discipline was imposed upon Graham, which suggests that Brown confirmed that Gil gave him permission to leave. The Employer cites no precedent, and I am unaware of any, that holds that reimbursement to observers puts them "on the Union payroll."

There is no evidence that Graham engaged in any actions as an agent of the Union. The actions in which he engaged constituted legitimate advocacy for the Union and are protected by Section 7 of the Act. I shall recommend that the objections of the Employer to the election in the warehouse unit be overruled. Consistent with that recommendation, I find that after January 15, the Employer was obligated to bargain with the Union.

B. The Union's Objections

The Union's objections to conduct affecting the election relate to the drivers unit in which the employees did not select the Union as their collective bargaining representative. The Regional Director referred Objections 1 and 3 through 6 for hearing. The Union withdrew Objection 2.

Objection 1 alleges that the Employer polled and interrogated employees. The record establishes that President Islam, usually with Molina present as an interpreter or witness, spoke with virtually every employee in the two units. There is no evidence that the Employer polled or interrogated any employees. I shall recommend that this objection be overruled.

Objection 3, coextensive with the complaint, alleges the prohibition of speaking about the Union and the suspension of Graham. Graham was in the warehouse unit, as was Yax. Yax, who as already noted testified through an interpreter, did not claim to have heard the comment that Herff directed to Graham, that he "couldn't be talking about the Union on Company time." There is no evidence that any drivers unit employee knew of the prohibition or that Graham had been sent home. In these circumstances, I am unable to find that the objectionable conduct could have had any effect upon the election in the drivers unit. *Food Fair Stores of Florida, Inc.*, 120 NLRB 1669, 1673 (1958). I am mindful that the Board reached a different conclusion in *Vegas Village Shopping Corp*., 229 NLRB 279 (1977), but in that case the Board determined that an employer's multiple instances of objectionable conduct with regard to employees in one unit were "likely to have a coercive effect" upon employees in a different unit. Similarly, in *Vencor Hospital-Los Angeles*, 324 NLRB 234, 253–254 (1997), the Board held that the discharge of an active union supporter in one unit would "not pass unnoticed" in the other unit. The unlawful actions in this case related only to one employee in the warehouse unit, Graham, and there is no evidence that any employee in the drivers unit was aware of those actions. In these circumstances, I cannot find that the Employer's unlawful conduct with regard to Graham had any effect upon the election in the drivers unit. I, therefore, recommend that Objection 3 be overruled.

Objection 4 alleges that the Employer provided a bogus *Excelsior* list insofar as 6 of the addresses for the 13 drivers were incorrect. The record establishes that 5 rather than 6 of the addresses were incorrect. Following the representation hearing, the Company provided Region 16 with the list of eligible voters, separated by unit, as required by *Excelsior Underwear*, 156 NLRB 1236 (1966), the *Excelsior* list. That list was sent to the Union on December 27, 2007. The Union attempted to contact the employees on the list, sending letters and going on home visits. Eight of the letters sent to the total of 28 eligible voters were returned, an error rate of 28.5 percent. One of those letters was the letter sent to Kenneth Graham, whose street address number had been transposed, resulting in an incorrect address. Organizer Eric Wells, as corroborated by Graham, attempted to make home visits, but found only an abandoned or demolished apartment building at several of the addresses on the list.

President Islam confirmed that the employees of the Company are transient, explaining that they live "in those apartment complexes which are close to our area, and those are very, very transient apartment complexes[,] . . . leased month to month or three months, and we go by what the employee provides us when they hire and they put on their application. We have no way of verifying or confirming where they live or, in fact, what they're saying is a true statement." The Company does not mail the employees' paychecks to them and the employees "generally come in" to obtain their W-2 forms. Although the testimony of President Islam implies that the *Excelsior* list conformed to the addresses on the employees' applications, the Employer did not present any testimonial evidence in that regard nor did it present any documentary evidence establishing that the applications were the source of the addresses reported on the *Excelsior* list. Furthermore, the testimony of President Islam establishes that, in this case as in *Merchants Transfer Co.*, 330 NLRB 1165 (2000), the Employer does not rely upon those addresses when communicating with employees. Contrary to the assertion in the brief of the Employer that the *Excelsior* list contained the "exact information" that the Employer "had on file," there is no direct evidence in that regard on this

record.

A copy of the *Excelsior* list from which Organizer Wells worked reflects check marks next to the addresses of six of the employees in the drivers unit of 13, two employees with no marking, and five employees with no check mark after the address but with a mark after the zip code. A mark after the zip code of employee Segio Estrada is marked out and a check mark appears next to his address, indicating that, when he found the address, Wells placed a check mark next to the correct address. The letters sent to employees Freddy Navas and Santos Aguilar were returned due to inaccurate addresses, and there is a mark next to their zip codes but no check mark next to the addresses of those employees upon the list from which Organizer Wells worked. Although only two of the letters sent to employees in that unit were returned, the Postal Service would have attempted to forward first class mail sent to a current incorrect address; thus, I do not find that the return of only two letters to drivers unit employees detracts from Wells' credible testimony that other addresses were incorrect. The letters had been mailed on January 9 and the first was returned on January 12, the last on February 3. The Union brought the incorrect addresses to the attention of the Region after it received the returned letters, which was after the election.

In the drivers unit of 13 employees, of the 10 votes cast, 4 were cast for the Union and 5 were cast against representation. There was one void ballot. The record does not reveal the names of the three unit employees who did not vote. Thus, a change of only one vote against representation to a vote for the Union would have resulted in the Union winning the election. There is no evidence that the Union was able to contact the two drivers whose letters were returned because of incorrect addresses. If, because the Union was unable to inform those two employees of their representational rights and if they voted against representation, their votes would have been outcome determinative, i.e. if they had voted for the Union, the Employer would have received 3 votes and the Union would have received 6.

Documentary evidence, 8 of 28 letters returned, establishes a 28.5 percent overall error rate in the Excelsior list. The two returned letters of drivers unit employees and the notations of Organizer Wells establish incorrect addresses for 5 of the 13 employees in that unit. Thus, the Union was precluded from presenting information regarding their organizational rights to 38 percent cent of the employees in that unit. Although Graham believes that he spoke with every employee, he speaks minimal Spanish and could speak only as a prounion employee, not as a representative of the Union that would bargain on behalf of the employees. In circumstances such as these, the Board does not address the "administrative monstrosity" of whether the employees were aware of the issues. *Sonfarrel, Inc*., 188 NLRB 970, 971 (1971).

Although there is no affirmative evidence of bad faith or gross negligence, there is no evidence that the Employer made any effort to assure submission of an accurate Excelsior list. *Merchants Transfer Co*., supra at 1165. Notwithstanding President Islam's testimony implying that the Excelsior list was prepared from employees' applications, there is no direct evidence of who prepared the Excelsior list or from what information it was prepared. Precedent establishes that evidence of a good faith attempt to provide correct information with regard to the *Excelsior* list is immaterial insofar as the information is erroneous. *Mod Interiors*, 324 NLRB 164 (1997). Similarly, a finding of bad faith or gross negligence is "not a precondition for the conclusion that an employer has failed to comply substantially with the *Excelsior* rule." *Merchants Transfer Co*., supra at 1165. The number of erroneous addresses provided is unacceptable and significant insofar as it precluded the Union from presenting of "information necessary for their exercise of their Section 7 rights" to 38 percent of the employees in the drivers unit, an outcome determinative number. *Mod Interiors*, supra at 164. The Union's Objection 4 is sustained.

Objection 5 contends that the Employer used a supervisor, Retail Sales Manager Molina, as the company observer at the election. It is undisputed that Molina did serve as the Company observer, and Graham's uncontradicted testimony establishes that, when he observed that Molina was to be the observer, he protested to Eric Wells that he was a manager, that it was illegal for him to be at the table and that a representative of the Employer answered that Graham was ineligible to serve because he was the "lead union organizer." Graham, a unit employee, was eligible to serve as the observer for the Union. Whether it was proper for Molina to serve as the company observer is a different matter.

There is conflicting evidence as to whether Molina performed supervisory duties on alternate weekends. I need not address that issue insofar as it is clear that Molina was an agent of management. The Employer's brief refers to Molina as a "senior sales person," but Molina referred to himself as Retail Sales Manager, and he has an office on the second floor of the Employer's facility, the floor where all administrative offices are located. Islam acknowledged that Molina regularly served as his interpreter when speaking with employees, both in his individual meetings relating to the election and as an interpreter or witness when disciplining employees. Islam admitted that he "personally wanted to meet with each and every individual" and that Molina "was part of the process that I was working with." Molina, as management's interpreter, was the Employer's agent. See *Poly-America Inc.*, 328 NLRB 667 (1999).

The only evidence relating to the substance of Islam's "process" was informing employees that they did not need a union, as evidenced by his assurance to Graham that, "if he worked hard, he would get a raise" regardless of the outcome of the election. Molina admitted that he had no individual conversation with any employee regarding the Union, that his only involvement was as an interpreter for management.

Although employee Yax felt that Manager Molina was "neutral," employee Graham, who had assured the employees that no manager would be present at the election, observed that the employees' "eyes got wider" when they saw that Molina was serving as the Company observer. Insofar as Molina served as the regular interpreter for Islam in his individual meetings relating to the election and as an interpreter or witness for management when employees were disciplined, I find that the drivers unit employees "would reasonably have believed" that Molina was "expressing management's antiunion view and acting on management's behalf." *Poly-America Inc.* supra. When Molina

served as an observer, he would have been "considered by the employees as an agent" of the Employer. *B-P Custom Bldg. Products*, 251 NLRB 1337, 1338 (1980). "[E]mployees closely associated with management may not serve as observers." *Butera Finer Foods*, 334 NLRB 43 (2001). Objection 5 is sustained.

Objection 6 alleges that Board election notices were defaced. Graham observed that, on at least one election notice, markings had been made on the sample ballot that appeared on the notice. Graham brought this to the attention of General Manager Brown who immediately replaced the defaced notice. Although Graham thereafter observed other defaced notices, he did not recall bringing those defacements to the attention of management. Brown confirms that he immediately replaced the notices when Graham brought the defacement to his attention and recalled that Graham did, on at least one other occasion, inform him of another defaced notice which he immediately replaced. Both Brown and President Islam testified that whenever they observed a defaced notice, it was replaced. I shall recommend that Objection 6 be overruled.

I find that the foregoing objectionable conduct relating to the insufficiency of the *Excelsior* list and use of Manager Molina as the Employer's observer interfered with the choice of the employees in the drivers unit and that, therefore, a new election must be held in that unit.

CONCLUSIONS OF LAW

1. By prohibiting employees from engaging in workplace conversations relating to the Union while permitting workplace conversation about other subjects and suspending an employee for protesting that prohibition, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By laying off an employee because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By unilaterally, without notice to and bargaining with the Union, laying off unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully suspended and discriminatorily laid off Kenneth Graham, it must offer him reinstatement and make him whole for any loss of earnings he suffered on January 9, 2008, and for any loss of earnings and other benefits, computed on a quarterly basis from January 25, 2008, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent must also post an appropriate notice in both English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Seafood Wholesalers, Ltd., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from engaging in workplace conversations relating to the Union while permitting workplace conversation about other subjects and suspending them for protesting that prohibition.

(b) Laying off or otherwise discriminating against any employee because of that employee's membership in or activities on behalf of International Union of Operating Engineers, Local Union 564, AFL–CIO, or any other labor organization.

(c) Unilaterally, without notice to and bargaining with the Union, laying off employees in the warehouse bargaining unit.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Kenneth Graham full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Kenneth Graham whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension and discriminatory layoff in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discriminatory layoff, and within 3 days thereafter, notify Kenneth Graham in writing that this has been done and that the suspension and layoff will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Houston, Texas, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respon-

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

dent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 9, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 16–RC–10819 be severed from Cases 16–CA–25998, 16–CA–26017, and 16–CA–26275 and that Case 16–RC–10819 be remanded to the Regional Director of Region 16. The Employer's objections to the election in the warehouse unit are overruled and the Regional Director shall issue a certification of representative with regard to the warehouse unit. The Union's Objections 4 and 5 are sustained and, therefore, the election in the drivers unit must be set aside and a new election conducted. Prior to the submission of the *Excelsior* list, the Employer shall ascertain the current address of all employees in the drivers unit and report those addresses upon the *Excelsior* list.

DIRECTION

A second election by secret ballot shall be held among the employees in the drivers unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.,* 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Union of Operating Engineers, Local Union 564, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear,* 156 NLRB 1236 (1966), *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. February 3, 2009

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT prohibit you from engaging in workplace conversations relating to the Union while permitting workplace conversation about other subjects or suspend you for protesting any such prohibition.

WE WILL NOT lay off or otherwise discriminate against any of you because of your membership in or activities on behalf of International Union of Operating Engineers, Local Union 564, AFL–CIO, or any other labor organization.

WE WILL NOT unilaterally, without notice to and bargaining with the Union, lay off any warehouse bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Kenneth Graham full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Kenneth Graham whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension and discriminatory layoff, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discriminatory layoff, and within 3 days thereafter, notify Kenneth Graham in writing that this has been done and that the suspension and layoff will not be used against him in any way.

SEAFOOD WHOLESALERS LTD